168

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Supreme Court, U.S.
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No. 09-1372

In the Supreme Court of the United States

MEDISON AMERICA, INC.,
Petitioner,

v.

PREFERRED MEDICAL SYSTEMS, LLC, JERRY KIRK McGUIRE and GREG REED,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

John J. Cook
Counsel of Record
Pietrangelo Cook PLC
6410 Poplar Avenue
Suite 190
Memphis, Tennessee 38119
(901) 685-2662
jcook@pcplc.com

Counsel for Respondents

August 5, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

Because the Respondents believe that the Petitioner did not properly state the questions raised, Respondents have re-ordered and re-stated the questions as follows:

I. Whether the decision of the District Court conflicts with this Court's decision in *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986) or with the decision of the other court of appeals relied upon by Petitioner.

II. Whether the District Court, which had jurisdiction based both on a federal question and on diversity, erred by using the federal standard for summary judgment instead of the Tennessee standard.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Preferred Medical Systems, LLC states that it has not issued shares to the public, that it has no parent company and that it has no affiliates, parent companies or subsidiaries that have issued shares to the public.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

RULE 29.6 CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES vi

STATEMENT OF THE CASE 1

I. Procedural History 1

II. Facts Relevant to Petition 4

III. The Opinions Below 8

SUMMARY OF ARGUMENT 9

ARGUMENT-REASONS FOR DENYING PETITION 12

I. The decision of the District Court does not conflict with this Court's decision in *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986) or with the decision of the other courts of appeals cited by Petitioner. 12

A. Under *Celotex*, the summary judgment movant who does not bear the burden of proof at trial must nevertheless point out to the district court that there is an absence of evidence to support the nonmoving party's case. 13

B. The District Court properly allocated the initial burden on the Defendants in accord with the summary judgment principles described in *Celotex*. 14

1. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604 (11th Cir. 1991). 16

2. The summary judgment standard utilized by the District Court under W.D. Tenn. Local Rule 7.2(d) is the same as the standard described in *Celotex* and *Clark*. 18

3. The District Court's decision is consistent with *Celotex* and *Clark*. 19

(a) *Patterson's Testimony*. 21

(b) *Harris' Testimony*. 22

(c) *Little's Testimony* 22

(d) *Martin's Affidavit*. 28

(e) *Dr. Sigman's Affidavit* 28

(f) *Barton's Affidavit* 29

(g) *Therber's Affidavit*. 29

(h) *Austin's Affidavit* 30

C. There is no conflict between the burden imposed by the Eleventh Circuit and the Sixth Circuit. 31

II. The District Court, which had jurisdiction based both on a federal question and on diversity, did not err by using the federal standard for summary judgment instead of the Tennessee standard. 32

CONCLUSION 39

APPENDIX

Appendix A: Statement of Undisputed Material Facts in Support of Defendants' Motion for Summary Judgment, In the United States District Court for the Western District of Tennessee Western Division (July 10, 2007) . 1b

TABLE OF AUTHORITIES

CASES

Adickes v. S.H. Kress & Co.,
398 U.S. 144 (1970) 14

Am. Council of Certified Podiatric Physicians and Surgeons v. Am. Bd. of Podiatric Surgery, Inc.,
185 F.3d 606 (6th Cir. 1999) 24

Baranowski v. Hart,
486 F.3d 112 (5th Cir. 2007), *cert. denied*,
128 S. Ct. 707, 169 L. Ed. 2d 553 (2007) 36

Byrd v. Blue Ridge,
356 U.S. 525 (1958) 35

Celotex Corp. v. Catrett,
477 U.S. 317 (1986) ..... *passim*

Clark v. Coats & Clark, Inc.,
929 F.2d 604 (11th Cir. 1991) ..... *passim*

Devonshire v. Johnston Group First Advisors,
166 Fed.Appx. 811, 2006 WL 172233 (6th Cir. 2006) 38

Doe v. Doe,
941 F.2d 280 (5th Cir. 1991) 33

Fidelity & Deposit Co. of Maryland v. United States,
187 U.S. 315 (1902) 36

GBJ Corp. v. Eastern Ohio Paving Co.,
139 F.3d 1080 (6th Cir. 1998) 31

Hanna v. Plumer,
380 U.S. 460 (1965) 11, 12, 33

Hannan v. Alltel Publ'g Co.,
270 S.W.3d 1 (Tenn. 2008) 32, 36, 37

Helms v. Zubaty,
495 F.3d 252 (6th Cir. 2007) 31

Lavin v. New York News, Inc.,
757 F.2d 1416 (3d Cir. 1985) 34

Leadbetter v. Gilley,
385 F.3d 683 (6th Cir. 2004) 31

Lewis Refrigeration Co. v. Sawyer Fruit, Vegetable & Cold Storage Co.,
709 F.2d 427 (6th Cir. 1983) 34

McEwen v. Delta Air Lines, Inc.,
919 F.2d 58 (7th Cir. 1990) 33

Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.,
130 S. Ct. 1431 (2010) 35, 38

Stickley v. State Farm Mut. Auto. Ins. Co.,
505 F.3d 1070 (10th Cir. 2007) 33

Street v. J.C. Bradford & Co.,
886 F.2d 1472 (6th Cir. 1989) 32

Sullivan v. Massachusetts Mut. Life Ins. Co.,
611 F.2d 261 (9th Cir. 1979) 34

Thompson v. Williamson County, Tennessee,
219 F.3d 555 (6th Cir. 2000) 31

STATUTES

15 U.S.C. § 1125(a)(1)(B) (2007) 20

RULES

W.D. Tenn. Local Rule 7.2(d) 10, 18

Fed. R. Civ. P. 56 ..... *passim*

Tenn. R. Civ. P. 56 ..... *passim*

STATEMENT OF THE CASE

The Petitioner's Statement of the Case omits important items from the procedural history and from the facts relevant to the Petition. Respondents therefore submit their own Statement of the Case.

I. Procedural History.

The Petitioner Medison America, Inc. ("Medison") sells ultrasound equipment in the United States which is manufactured by Medison, Ltd., a Korean Company. Medison is wholly owned by Medison, Ltd. General Electric Company ("GE") manufactures ultrasound equipment that competes with Medison ultrasound equipment. Defendant Preferred Medical Systems, LLC ("Preferred Medical") is an independent representative for GE. Defendants McGuire and Reed work for Preferred Medical.

On May 26, 2005, Medison filed the Complaint in the District Court. The Complaint contains claims under the federal Lanham Act, along with state law claims, and seeks damages of $18 million, in addition to other relief.

Medison's claims arise from statements allegedly made by Defendants that Medison was in bankruptcy and/or having financial difficulties and that Medison did not support and had problems servicing ultrasound equipment.

During the two years that the case was pending, the parties conducted extensive discovery.

On July 10, 2007, Defendants filed a Motion for Summary Judgment on all claims. On the same date, the Defendants filed a supporting memorandum, statement of undisputed material facts and the relevant portions of the record relied upon by the Defendants in support of the motion. In their Motion, the Defendants maintained that the testimony from Medison's witnesses was either inadmissible hearsay, failed to show that the alleged statements were false or misleading, or failed to create a genuine issue on another essential element of Medison's claims.

The precise portions of the record filed with, and in support of, the Defendants' Motion for Summary Judgment included the following:

Declaration of Kirk McGuire

Deposition Transcript of Medison's corporate representative Robert DePalma

Medison's Response's to Requests for Admission

Korean Company Reorganization Act

Medison's Rule 26 Disclosures

Declaration of Greg Reed

Medison's Response to Interrogatories

Deposition Transcript of Mark Patterson

Deposition Transcript of Martin Harris

Deposition Transcript of Mary Margaret Little

Affidavit of Mary Margaret Little

Affidavit of Cheryl Martin

Deposition Transcript of David Ciscel

Deposition Transcript of Dr. Marla Stafford

The Petitioner in its Statement of the Case erroneously states that Defendants only filed a single affidavit in support of the Motion for Summary Judgment. (Pet. 2). Petitioner simply ignores the substantial amount of materials that Defendants did in fact file and which were referred to in the Defendants' Motion for Summary judgment as described above.[1]

Medison filed a response to the motion for summary judgment, along with complete copies of the deposition transcripts referred to above and affidavits from four additional witnesses.

On August 31, 2007, Defendants filed a reply memorandum, and on September 11, 2007 Medison filed a Sur-Reply memorandum.

On November 16, 2007, the District Court entered summary judgment in favor of the Defendants on all counts.

On December 11, 2007, Medison filed its Notice of Appeal of the District Court's Summary Judgment.

On December 18, 2009, the Sixth Circuit rendered an opinion affirming the District Court's decision.

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[1] The various materials which Defendants filed with the Motion were attached to and referenced in the Defendants' Statement of Undisputed Material Facts, a copy of which is attached hereto. (Resp. App. 1b).

On February 9, 2010, the Sixth Circuit denied Medison's petition for rehearing en banc.

II. Facts Relevant to the Petition.

Medison is a California corporation wholly owned by Medison, Ltd., a Korean company. Medison, Ltd. manufactures ultrasound equipment which is sold by Medison in the United States.

Defendant Preferred Medical is an independent sales representative for GE in the sale of ultrasound equipment.

As noted above, Medison's Complaint alleged that Defendants made statements to potential customers to the effect that Medison was in bankruptcy and/or having financial difficulties and that Medison did not support and had problems servicing its ultrasound equipment.

In January 2002, prior to the commencement of this lawsuit, Medison, Ltd. entered into a receivership procedure in Korea. (Pet. App. 18a).

In a memorandum to Medison, the Korean legal counsel for Medison, Ltd. stated that the reorganization proceedings in Korea were similar to Chapter 11 bankruptcy proceedings in the United States. Medison's auditors described Medison, Ltd.'s proceedings as a "bankruptcy" in Medison's financial statements. (Pet. App. 18a-19a).

In 2003, according to its audited financial statements, Medison's liabilities exceeded its assets by

$25,845,091, and in 2004 Medison's liabilities exceeded its assets by $24,671,941. (Pet. App. 19a).

Medison has only two service and support personnel in the United States, both of whom reside in California. If a service issue arises, the independent dealer who sold the equipment hires an independent contractor to address the issue. (Pet. App. 18a, 33a).

Medison has received customer complaints. A customer complaint ripened into a lawsuit against Medison in May 2003. The suit alleged that Medison "negligently repaired the equipment or negligently failed to repair the equipment on numerous occasions." (Pet. App. 22a-23a).

Medison's Complaint and Medison's Rule 26 Disclosures list prospective customers that Medison contends did not purchase its product because of the alleged disparaging statements (the "Prospective Customers"). None of the Prospective Customers had owned Medison equipment prior to the time of the alleged statements. (Pet. App. 19a-20a).

In response to interrogatories, Medison stated that the information in the Complaint came "exclusively from" Mark Patterson, Mary Margaret Little, and Cheryl Martin. Medison added Martin Harris to this list during its Rule 30(b)(6) deposition. (Pet. App. 20a).

In its response to the motion for summary judgment, Medison identified these additional witnesses: Dr. Robert Sigman, Myra Therber, Carol Barton and Dr. Joseph Austin. (Pet. App. 28a).

Patterson worked with a Medison distributor. Patterson testified about statements allegedly made by Defendants. However, Patterson testified that he was not actually present at the time the alleged statements were made. (Pet. App. 29a).

Harris, who owns a Medison distributor, testified about statements allegedly made by Defendants. Like Patterson, Harris testified that he did not actually hear any of the Defendants make the alleged statements. (Pet. App. 30a).

Little is a former employee of Preferred Medical. Little's employment with Preferred Medical was terminated on July 27, 2004. (Pet. App. 21a).

Little testified that while working for Preferred Medical she made statements about Medison, but when asked during her deposition Little could not identify the name of any customer to whom such statements were allegedly made. (Pet. App. 30a-31a).

Little testified Preferred Medical employees Scott Martin and Kim Wilson also made statements about Medison, but when asked during her deposition Little could not identify any of the customers who allegedly heard the statements. (Pet. App. 21a).

Little identified two specific customers to whom McGuire allegedly made statements, but Little testified that she did not actually hear the statements. (Pet. App. 21a, 35a-36a).

The only other customer Little mentions is in her affidavit---an OB practice in New Albany, Mississippi. However, Little testified that this customer's decision

to purchase a GE product, rather than a Medison, was based upon negative information the customer received from another Medison customer, not on information from Preferred Medical. (Pet. App. 22a).

Little did not speak to any potential purchasers about their reactions to the alleged statements. (Pet. App. 22a).

Little has never heard defendant Reed make disparaging statements about Medison. (Pet. App. 22a).

Cheryl Martin is a former technician who worked for Preferred Medical. Martin testified about a single incident involving her own statement about Medison's bankruptcy to a health care provider in 2003. At the time, however, Martin was not working for the Preferred Medical and was in the doctor's office for personal reasons. She was accompanying her daughter, who was pregnant. (Pet. App. 22a).

Dr. Sigman testified that he heard the alleged statements. However, Dr. Sigman did not testify that he believed the statements or that the statements caused him not to purchase a Medison product. In fact, Dr. Sigman testified that the statements caused him to not purchase a product from Preferred Medical. (Pet. App. 37a-38a).

Dr. Austin testified that he heard the alleged statements. However, Dr. Austin did not testify that the statements caused him not to purchase a Medison product. In fact, Dr. Austin purchased a Medison ultrasound product. (Pet. App. 39a).

Another Medison witness, Carol Barton, testified to one particular instance of the alleged statements, but Barton did not hear the statements herself. (Pet. App. 38a).

Medison witness Myra Therber testified that Defendants made statements that Medison was having bankruptcy problems. Therber's affidavit did not state the basis for her knowledge. Because Therber did not work with the defendants or prospective customer, the District Court found that the context and content of Therber's testimony did not support an inference that it was based upon personal knowledge. (Pet. App. 38a-39a).

III. The Opinions Below

The District Court granted the Defendants' Motion for Summary Judgment on all counts. The District Court reviewed each item of the extensive evidence identified by the Defendants, together with the other materials filed by Medison with its Response. The District Court found that the Defendants were entitled to summary judgment because the testimony from Medison's witnesses was either inadmissible hearsay, failed to show that the alleged statements were false or misleading, or failed to create a genuine issue on another essential element of Medison's claims. (Pet. App. 15a-52a)

The Sixth Circuit affirmed the District Court's decision. (Pet. App. 1a).

SUMMARY OF ARGUMENT

This case does not warrant review.

Contrary to the Petitioner's assertions, the District Court's decision does not conflict with this Court's decision in *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986) ("Celotex"), or with the decision of the other court of appeals relied upon by Petitioner.

In *Celotex*, this Court held that when the non-moving party bears the burden of proof at trial, the moving party need not support its motion with affidavits or other similar material negating the opponent's claim, in order to discharge this initial responsibility. Instead, the moving party simply may show--that is, point out to the district court--that there is an absence of evidence to support the nonmoving party's case. *Id.* at 323-325.

In *Clark v. Coats & Clark, Inc.*, 929 F.2d 604 (11th Cir. 1991), the case cited by the Petitioner as the conflicting decision, the Eleventh Circuit stated that "the movant may meet its Rule 56 burden without negating an element of the nonmoving party's claim and that under such circumstances it is sufficient to point to materials on file that demonstrate that the party bearing the burden of proof at trial will not be able to meet that burden. Even after *Celotex* it is never enough simply to state that the non-moving party cannot meet its burden at trial." *Clark*, 929 F.2d at 608.

The Petitioner contends that the District Court deviated from the standard of *Celotex* and *Clark* because the Defendants (according to Petitioner)

merely "suggested" that there was an absence of proof rather than actually pointing to and showing the District Court the evidence in the record demonstrating that Medison would not be able to prove its case. (Pet. 33).

The Petitioner's argument is without merit. The District Court's decision is consistent with *Celotex* and *Clark*. Under the local rules applicable to the District Court, a movant may not merely "suggest" that the nonmovant cannot prove its case, but instead must identify and submit evidentiary materials in support of such an assertion. *See* W.D.Tenn. Local Rule 7.2(d).

Further, the Petitioner has mischaracterized the summary judgment motion and ignores the specific and extensive portions of the record relied upon by the District Court in granting the motion. The motion did not merely "suggest" that Medison could not prove its case, but also included specific portions of the record (including Medison's responses to interrogatories and requests for admissions, Medison's Rule 26 disclosures, affidavits and deposition transcripts of Medison's witnesses, and Medison's own documentation) and demonstrated why such materials showed that there was no genuine dispute about a material fact.

The Defendants sought summary judgment on Medison's Lanham Act, defamation and other state law claims. The motion and the referenced materials demonstrated that that the testimony from the witnesses identified by Medison was either inadmissible hearsay, failed to show that the alleged statements were false or misleading, or failed to create a genuine issue on another essential element of Medison's claims.

Based upon the Defendants' motion and the materials in the record, the District Court concluded that there was no genuine issue of material fact and that the Defendants were entitled to a judgment as a matter of law.

Much of the Petition attempts to describe a conflict or ambiguity in the way other courts (both in and outside the Sixth Circuit) in other cases may have interpreted and applied the summary judgment principles of *Celotex*. Regardless of whether there may be ambiguities or conflicts among any other cases, this particular case is easily harmonized with *Celotex*, as well as the Eleventh Circuit's decision in *Clark*. This case is therefore not the vehicle to resolve any such conflict or ambiguity, and a writ of certiorari should not be granted.[2]

The Petitioner's alternative grounds for review are similarly without merit. Petitioner maintains that the District Court should have used the Tennessee standard for summary judgment instead of the federal standard.

This Court has long held that in diversity actions "federal courts are to apply state substantive law and federal procedural law." *Hanna v. Plumer*, 380 U.S. 460, 465 (1965). Where the source of the federal rule is the Federal Rules of Civil Procedure the decisive question is whether the rule governs a matter "which, though falling within the uncertain area between

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[2] As illustrated below in Section I.C. of "Reasons for Denying the Petition", there really is no conflict between the Sixth Circuit and the Eleventh Circuit.

substance and procedure, [is] rationally capable of classification as either," *id.* at 472. If the subject matter of the federal rule is "arguably procedural" *id.* at 476 (Harlan, J., concurring), then the rule does not overstep the Rules Enabling Act and is therefore to be followed. *Id.* at 471.

Further federal rules purporting to govern procedural matters, which are duly passed by Congress, shall be presumed constitutionally valid unless they cannot rationally be characterized as rules of procedure. *See Hanna,* 380 U.S. at 471.

Courts universally have found that the federal rules for summary judgment are procedural and therefore applicable in diversity actions rather than the state summary judgment rules. Petitioner cites no authority to the contrary. Accordingly, the District Court did not err by using the federal standard for summary judgment, so a writ of certiorari should not be granted.

ARGUMENT - REASONS FOR DENYING THE PETITION

I. The decision of the District Court does not conflict with this Court's decision in *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986) or with the decision of the other courts of appeals cited by Petitioner.

This case does not warrant review. Contrary to the Petitioner's assertions, the District Court's decision does not conflict with this Court's decision in *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986), or with the

decision of the other court of appeals relied upon by Petitioner.

The Petitioner's argument for a writ of certiorari gives very little consideration to the actual details of the District Court's decision in this case. Instead, the bulk of the Petition attempts to describe a conflict or ambiguity in the way other courts (both in and outside the Sixth Circuit) in other cases may have interpreted and applied the summary judgment principles of *Celotex*. Regardless of whether there may ambiguities or conflicts among any other cases, this particular case is easily harmonized with this Court's decision in *Celotex*, as well as the decision of the other court of appeals relied upon by Petitioner. This case is therefore not the vehicle to resolve any such conflict or ambiguity, and a writ of certiorari should not be granted.

A. Under *Celotex*, the summary judgment movant who does not bear the burden of proof at trial must nevertheless point out to the district court that there is an absence of evidence to support the nonmoving party's case.

In *Celotex*, this Court held that when, as in the present case, the non-moving party bears the burden of proof on an issue at trial, the moving party need not "support its motion with affidavits or other similar material negating the opponent's claim," *Id.* at 323, in order to discharge this initial responsibility. Instead, the moving party simply may " 'show[ ]'--that is, point[ ] out to the district court--that there is an absence of evidence to support the nonmoving party's case." *Id.* at

325 (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159 (1970)).

Justice White, who joined the majority in the *Celotex* decision, added a separate concurring opinion, stating:

> I agree that the Court of Appeals was wrong in holding that the moving defendant must always support his motion with evidence or affidavits showing the absence of a genuine dispute about a material fact. I also agree that the movant may rely on depositions, answers to interrogatories, and the like, to demonstrate that the plaintiff has no evidence to prove his case and hence that there can be no factual dispute. But the movant must discharge the burden the Rules place upon him: It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case.

447 U.S. at 328 (White, J. concurring).

B. The District Court properly allocated the initial burden on the Defendants in accord with the summary judgment principles described in *Celotex*.

The District Court in this case properly allocated the initial burden on Defendants in accord with the summary judgment principles described in *Celotex*. The Petitioner is contending to the contrary-----that the District Court deviated from the standard of *Celotex* because the Defendants (according to

Petitioner) merely "suggested" that there was an absence of proof rather than actually pointing to and showing the District Court the evidence in the record demonstrating that Medison would not be able to prove its case. (Pet. 33).

The Petitioner's argument is without merit and ignores the record in this case.

The District Court's decision is consistent with the standard described in *Celotex*, including Justice White's statements in the concurring opinion. As illustrated below, the Petitioner has mischaracterized the Defendants' summary judgment motion and ignores the specific and extensive portions of the record relied upon by the District Court.

After the completion of two years of discovery, Defendants moved for summary judgment. The Motion did not merely "suggest" that Medison could not prove its case, but also included specific portions of the record (including Medison's responses to interrogatories and requests for admissions, Medison's Rule 26 disclosures, affidavits and deposition transcripts of Medison's witnesses, and Medison's own documentation) and demonstrated why such materials showed that the testimony from the witnesses identified by Medison was either inadmissible hearsay, failed to show that the alleged statements were false or misleading, or failed to create a genuine issue on another essential element of Medison's claims. (Pet. App. 28a-42a).

Based upon the Motion and the materials in the record, the District Court concluded that there was no genuine issue of material fact and that the Defendants

were entitled to a judgment as a matter of law. (Pet. App. 52a)

1. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604 (11th Cir. 1991).

The Petitioner relies on the Eleventh Circuit decision in *Clark v. Coats & Clark, Inc.*, 929 F.2d 604 (11th Cir. 1991) to show that the decision in the present case conflicts with *Celotex*. (Pet. 22-24). A review of the *Clark* decision along with the District Court's decision reveals that the Petitioner's reliance is misplaced.

In *Clark*, the Eleventh Circuit opined on the summary judgment standard as described in *Celotex* and in particular on the burden placed upon the moving party.

> The moving party bears the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment. *Celotex* did not change the general rule. ***Celotex* simply holds that under certain circumstances the movant may meet its Rule 56 burden without negating an element of the non-moving party's claim and that under such circumstances it is sufficient to point to materials on file that demonstrate that the party bearing the burden of proof at trial will not be able to**

> **meet that burden. Even after *Celotex* it is never enough simply to state that the non-moving party cannot meet its burden at trial.**

Clark, 929 F.2d at 608 (emphasis added).

Thus, the Eleventh Circuit held that the movant must do more than simply state or suggest that the non-moving party cannot meet its burden at trial. The movant must "point to materials on file that demonstrate that the party bearing the burden of proof at trial will not be able to meet that burden." *Id.*

The Eleventh Circuit explained how the movant in *Celotex* satisfied its initial burden.

> Celotex met its burden by noting that Catrett "had failed to identify, in answering interrogatories specifically requesting such information, any witness who could testify about the decedent's exposure to [Celotex's] asbestos products." *Id.* at 320. The Court's inquiry did not end there, however. By meeting its burden, Celotex merely shifted the burden to Catrett to point to other portions of the record that would show that there was indeed a genuine issue of fact regarding the causation issue. The Court's conclusion that Celotex had met its burden under these circumstances is understandable. To have required a trial when it was clear from the materials in the record that Catrett could not prove her claim would have been a waste of time and resources, and

> would have unnecessarily restricted the proper use of summary judgment.

929 F.2d at 607-608.

According to this Court and the Eleventh Circuit, a movant can satisfy its initial burden by pointing to answers to interrogatories which confirm that the non-movant has no witness to support an essential element of its claim. The movant thereby shifts the burden to the non-movant to show that there is a genuine issue.

2. The summary judgment standard utilized by the District Court under W.D. Tenn. Local Rule 7.2(d) is the same as the standard described in *Celotex* and *Clark*.

The initial burden placed by the District Court upon the movants in the present case is the same as the one described in *Celotex* and in *Clark*. Indeed, the local summary judgment rule applicable to the District Court in this case is virtually identical to the standard described in *Clark* and *Celotex*

> If the proponent contends that the opponent of the motion cannot produce evidence to create a genuine issue of material fact, the proponent shall affix to the memorandum copies of the precise portions of the record relied upon as evidence of this assertion.

W.D. Tenn. Local Rule 7.2(d).

Therefore, contrary to the Petitioner's contention, the District Court did not simply allow the Defendants to state or "suggest" that Medison could not prove its

case. Rather, the Defendants were required to point to and file precise portions of the record which demonstrated that Medison would not be able to meet its burden of proof at trial.

3. The District Court's decision is consistent with *Celotex* and *Clark*.

A review of the District Court's decision reveals that it is in conformity with *Celotex* and *Clark*. The District Court expressly cited *Celotex*:

> The party that moves for summary judgment has the burden of showing that there are no genuine issues of material fact at issue in the case...This may be accomplished by pointing out to the court that the nonmoving party lacks evidence to support an essential element of its case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

(Pet. App. 25a).

The Defendants satisfied the initial burden by identifying relevant parts of the record, filing them with the District Court and demonstrating why Medison would not be able to satisfy its burden at trial. The motion is replete with references to specific materials on file that demonstrated that Medison would not be able to satisfy its burden at trial. Such materials included the Complaint, Medison's responses to interrogatories and requests for admission, deposition and affidavit testimony from Medison's witnesses, Medison's Rule 26 disclosures, and Medison's own documents obtained in the course of discovery, all of which were referenced in and attached

to Defendants' Statement of Undisputed Material Facts. (Resp. App. 1b).

Contrary to Petitioner's contention, the District Court did not rely on the Defendants' mere "suggestion" that Medison could not prove its case. The District Court's 41-page opinion carefully analyzes testimony and other portions of the record in order to determine whether there was a genuine issue of material fact for each of Medison's asserted causes of action. (Pet. App. 29a-39a).

The District Court's analysis begins with Medison's Complaint, which alleged that the Defendants had made certain disparaging statements to potential purchasers of Medison's ultrasound products. The Complaint and Medison's Rule 26 Disclosures listed prospective customers that Medison contended did not purchase its product because of the alleged disparaging statements. Together, these documents identified the universe of customers to whom Medison alleged the defendants made disparaging statements about Medison and/or its products (referred to as the "Prospective Customers"). (Pet. App. 19a).

Medison asserted claims under the federal Lanham Act, as well as various state law causes of action. In order to succeed on its Lanham Act and other claims, Medison was required to show that Defendants made false or misleading statements of fact about Medison's products to the Prospective Customers. *See e.g.* 15 U.S.C. § 1125(a)(1)(B) (2007). (Pet. App. 27a).

In their Motion for Summary Judgment, like the movant in *Celotex*, the Defendants referred to Medison's response to interrogatories wherein Medison

stated that the information in the complaint came "exclusively from" Mark Patterson, Mary Margaret Little, and Cheryl Martin. Medison added Martin Harris during its deposition. (Pet. App. 20a). Additionally, in response to the Motion, Medison submitted affidavit testimony from Dr. Sigman, Carl Barton, Myra Therber, and Dr. Austin. (Pet. App. 28a).

In their Motion, Defendants maintained that the testimony from Medison's witnesses was either inadmissible hearsay, failed to show that the alleged statements were false or misleading, or failed to create a genuine issue on another essential element of Medison's claims. (Pet. App. 24a). To support this assertion, Defendants pointed to and filed precise portions of the record relied upon as evidence of this assertion, all of which were attached to and referenced in Defendants' Statement of Undisputed Material Facts. (Resp. App. 1b).

The District Court reviewed each item to determine whether summary judgment was appropriate. The following is a description of the testimony and other evidence supporting the motion for summary judgment.

(a) *Patterson's Testimony.*

Patterson worked for a Medison distributor. During his deposition, Patterson testified about statements that were allegedly made by the Defendants. Patterson admitted, however, that he was not present when the statements were made, and that all of his information about the allegedly disparaging statements was obtained from third parties. He also testified that he did not have any documents that

contained the disparaging statements allegedly made by the Defendants. (Pet. App. 29a).

The District Court noted that Patterson was testifying about his conversations with Prospective Customers and offering the statements made to him by the Prospective Customers for their truth, that is, that the Defendants made allegedly disparaging statements to the Prospective Customers. The District Court concluded that this testimony from Patterson represented a first level of hearsay that does not fall under any exception. Because Patterson's testimony was based on hearsay, the District Court properly did not consider it for purposes of summary judgment. (Pet. App. 30a).

(b) *Harris' Testimony.*

Harris also worked for a Medison distributor. Harris testified at his deposition about statements allegedly made by Defendants. Harris, however, like Patterson admitted that he was not present at the time the alleged statements were made and that he did not hear the Defendants make any of the alleged statements. Using the same analysis applied to Patterson, the District Court concluded that Harris' testimony was also based on hearsay. (Pet. App. 30a).

(c) *Little's Testimony*

Little was a former employee of Defendant Preferred Medical who testified that she made disparaging statements about Medison to some of the Prospective Customers while she was employed by Defendant. (Pet. App. 21a, 30a-31a).

In order to satisfy the first element of its Lanham Act claim, Medison was required to show that Little's statements were false or misleading statements of fact. The District Court found that many of the statements were not false or misleading based upon the portions of the record identified by Defendants. (Pet. App. 31a-33a).

More particularly, the statements described by Little included alleged comments by Little that Medison was bankrupt, on the brink of bankruptcy, or in bankruptcy proceedings.

These comments were actually proven to be true by Medison's own documents. Medison's Complaint stated that Medison, Ltd. had entered into a receivership in Korea under the Company Reorganization Act of Korea. (Pet. App. 18a). However, Medison alleged in the complaint that using the word "bankruptcy" to describe the Korean receivership was "false and misleading".

Documents produced by Medison proved otherwise. For example, in an internal memorandum Korean legal counsel for Medison, Ltd. stated that the receivership was similar to Chapter 11 bankruptcy proceedings in the United States. Additionally, Medison's own auditors in Medison's financial statements described Medison, Ltd.'s proceedings as a "bankruptcy." The District Court noted that other courts have also found the Company Reorganization Act of Korea to be substantially similar to United States Chapter 11 bankruptcy law. (Pet. App. 31a).

The District Court therefore concluded that it would not be literally false to say that Medison, Ltd.'s

Korean proceedings involve bankruptcy. Moreover, because Medison, Ltd. and Medison shared the same name, it was not literally false to say that "Medison" was involved in bankruptcy. (Pet. App. 31a).

Furthermore, it could not be considered true yet misleading to refer to Medison, Medison, Ltd., or both as being involved in bankruptcy. Medison, Ltd. wholly owned Medison and manufactured all the equipment that Medison sold. Any negative implications of bankruptcy on Medison, Ltd., such as drastic reorganization or even a closure of business, would have severe repercussions on Medison and its ability to do business. As a result, the District Court concluded that the alleged statements made by Little involving Medison's bankruptcy could not be considered false and misleading. (Pet. App. 31a-32a).

The District Court added that even if the statements were found to be true yet deceptive, Little testified that she did not speak to any potential purchaser about their reactions to the alleged statements. (Pet. App. 22a, 32a). This would preclude the statements from satisfying the requirements of a Lanham Act claim. If the statements are true, yet deceptive, or inherently ambiguous, then proof of actual deception must be produced before a violation can be established. (Pet. App. 28a *citing Am. Council of Certified Podiatric Physicians and Surgeons v. Am. Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606, 614 (6th Cir. 1999)). A plaintiff relying on statements that are literally true yet misleading must show how customers actually reacted, not just how they could have reacted. *Id.* When questioned during her deposition, Little was unable to provide any testimony that showed how any Prospective Customers actually reacted to the

statements so her testimony was insufficient to create a genuine issue on this essential element. (Pet. App. 32a).

Little also testified that she made statements that Medison was financially unstable. The District Court found that such statements were true based upon Medison's own audited financial statements showing that Medison had multi-million dollar deficits in both 2003 and 2004, with liabilities exceeding its assets by more than $24 million each year. (Pet. App. 32a).

Little also testified that she said Medison was going out of business. The District Court found that this statement was a non-actionable opinion. As stated above, Lanham Act claims must be based on false or misleading statements of facts. The District Court concluded that when taken in context with the bankruptcy proceedings and financial instability, this statement was a mere prediction or opinion about the future of Medison, and consequently, was not actionable as a false or misleading statement of fact under the Lanham Act. (Pet. App. 33a).

Little testified that there were statements that Medison did not support or had problems servicing ultrasound equipment. When these statements were compared to the record, the District Court concluded that neither was literally false. Medison only employed two service agents, both of whom resided in California. Service for the equipment that might have been purchased by the Prospective Customers was the responsibility of the local dealer and not Medison. The District Court, however, concluded that the claim that Medison did not support its equipment could be true yet deceptive. Nevertheless, Little was unable to

provide any testimony as to how any Prospective Customers actually were deceived by or reacted to the claim that Medison did not provide support. Therefore, the District Court concluded that the statement did not satisfy a required element of a Lanham Act claim. (Pet. App. 33a-34a).

Similarly, the District Court found that Little's statements that Medison had problems servicing ultrasound equipment were not false or misleading statements of fact. Medison, as admitted by its corporate representative, did have complaints against it that related to its service of equipment, one of which ripened into a lawsuit. Therefore, stating that Medison had problems servicing equipment was not literally false. (Pet. App. 34a).

But the District Court concluded that the statement could be true yet deceptive. The statement could have deceived Prospective Customers into believing that Medison's service was substandard and inadequate, and that Medison had problems servicing all its equipment. (Pet. App. 34a).

Little, however, failed to provide any testimony that any Prospective Customers were actually deceived by this statement, so Little's testimony about the statement would be insufficient to satisfy a required element of a Lanham Act claim. (Pet. App. 34a).

Another defect in Little's testimony arose because, when questioned during her deposition, she was unable to specifically identify the names of any customers to whom she spoke, stating only that she told the "Medison Story" to every 3D or 4D customer who mentioned Medison. (Pet. App. 30a-31a).

Little testified that she heard Scott Martin and Kim Wilson tell the Medison Story to Prospective Customers. When asked, however, Little was unable to identify any of the people that Scott Martin or Kim Wilson were speaking to when she heard them telling the Medison Story. As a result, the District Court found that Little's testimony was insufficient to show that Mr. Martin or Ms. Wilson made such statements. (Pet. App. 35a).

One of the individual customers that Little was able to identify by name was Dr. Sigman, in Alabama, who allegedly was told the statements in the Medison Story by defendant Kirk McGuire. Little, nonetheless, was not present at the time McGuire allegedly spoke to Dr. Sigman. Little testified that McGuire told her that he had told the Medison Story to Dr. Sigman. Assuming that this testimony would be admissible non-hearsay, the District Court concluded that Little was still unable to testify about the effect of the statements on Dr. Sigman, which would be necessary to satisfy the elements of a Lanham Act claim. (Pet. App. 35a-36a).

Little identified Dr. Scott Smith as a person who had been told the Medison Story. In this instance, McGuire allegedly told Dr. Smith the Medison Story over Little's cell phone. Little was present with Dr. Smith while McGuire spoke with him over the phone. Little could not hear what McGuire told Dr. Smith, and she provided no testimony indicating that McGuire told her what he had told Dr. Smith. (Pet. App. 36a).

In summary, the District Court after a careful review of the materials in the record concluded that

Little's affidavit and deposition testimony was insufficient to establish the necessary elements of Medison's claims. (Pet. App. 36a).

(d) *Martin's Affidavit*.

Cheryl Martin, another former employee of Preferred Medical, testified about one time when she made a statement to a Prospective Customer about Medison being in bankruptcy. The District Court concluded that such a statement could not be considered false or misleading. Further, Martin was not working for Preferred Medical at the time, but was only in the doctor's office for personal reasons. Because she was not acting in the scope of employment, the District Court concluded that no statements she made could rightly be attributed to the Defendants. (Pet. App. 36a-37a).

(e) *Dr. Sigman's Affidavit*

Dr. Sigman, a Prospective Customer, testified that McGuire told him that Medison was financially unstable and bankrupt. As discussed above, neither statement is literally false when applied to Medison. Dr. Sigman testified that McGuire's statements gave him the impression that Medison "was or was on the verge of going out of business." The District Court found that this statement was not indicative of deception because the financial numbers for Medison, as previously discussed, suggested strong instability in the company, and thus, Dr. Sigman's impression did not indicate that he was actually deceived by McGuire's statements, a required element of a Lanham Act claim. (Pet. App. 37a-38a).

Dr. Sigman also testified that McGuire told him Medison could not provide service or maintenance and repair on its equipment. While technically true, as discussed above, this statement could have been deceptive. However, the District Court noted that there was no evidence that Dr. Sigman was actually deceived by the statements, a required element of the claims. In fact, Dr. Sigman testified that the statements caused him to not purchase from *Preferred Medical*. (Pet. App. 38a).

Further, as the Sixth Circuit noted, the affidavit did show that the Medison Story had harmed Medison, a required element of Medison's claims. (Pet. App. 9a).

(f) *Barton's Affidavit*

Another Medison identified witness, Carol Barton, testified to one instance of disparaging statements related to her by Joanne Pippin, a person who worked for a Prospective Customer. The District Court found the testimony to be insufficient because Barton's testimony was based on hearsay and could not be considered for summary judgment. (Pet. App. 38a).

(g) *Therber's Affidavit*.

Myra Therber testified that McGuire made statements to Dr. Drucker in Dalton, Georgia. Therber stated that McGuire told Dr. Drucker that Medison was having bankruptcy problems. The District Court found that such statements were not false or misleading statements of fact. Further, Therber's affidavit did not state the basis for her knowledge. The District Court found it impossible to tell from her testimony if she was present when the statements

were made or received the information from a third party. Because Therber did not work with McGuire, the context did not suggest that she would have been present when the statements were allegedly made. The District Court concluded that this created a high likelihood that her testimony was based on inadmissible hearsay and therefore disregarded the affidavit. (Pet. App. 38a-39a).

(h) *Austin's Affidavit*

Dr. Austin, a Prospective Customer, testified that McGuire made statements to him about Medison being in shaky financial condition and having trouble servicing its products. The District Court found that these statements were not literally false. Further, Dr. Austin provided no evidence to suggest that he was actually deceived by the statements. In fact, he purchased a Medison product. (Pet. App. 39a).

After carefully analyzing the affidavits, depositions and other materials in this case, the District Court found the admissible evidence was not sufficient to create a genuine issue of material fact as to whether false statements of fact were made by the Defendants or whether any other statements of fact actually deceived any of the Prospective Customers or harmed Medison. (Pet. App. 39a).

As illustrated above, the Defendants did not simply "suggest" that Medison could not prove its case. Both the motion and the District Court's decision were based upon an extensive analysis of the materials on file, all of which demonstrated that Medison would not be able to satisfy its burden at trial. The District Court's decision is consistent with the summary

judgment standard articulated in *Celotex* and *Clark*, and therefore the petition for a writ of certiorari should be denied.

C. There is no conflict between the burden imposed by the Eleventh Circuit and the Sixth Circuit.

Although not relevant in this particular case, it is worth noting that there really is no conflict between the burden imposed by the Eleventh Circuit and the Sixth Circuit. The Sixth Circuit in *GBJ Corp. v. Eastern Ohio Paving Co.*, citing *Celotex*, stated that "a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the [record] which it believes demonstrate the absence of a genuine issue of material fact." 139 F.3d 1080, 1089 (6th Cir. 1998).

The Petitioner's contention that the Sixth Circuit allows the movant for summary judgment to merely "suggest" that the plaintiff has no evidence to prove his case, without identifying portions of the record in support of the assertion, is without any basis. *See e.g. Helms v. Zubaty*, 495 F.3d 252, 255 (6th Cir. 2007) ("'The moving party has the burden of identifying which portions of the record before the court demonstrate the absence of a genuine issue of material fact."); *Leadbetter v. Gilley*, 385 F.3d 683, 689 (6th Cir. 2004) ("The party that seeks summary judgment bears the initial burden of specifying the basis upon which it contends judgment should be granted and of identifying that portion of the record which, in its opinion, demonstrates the absence of a genuine issue of material fact."); *Thompson v. Williamson County*,

Tennessee, 219 F.3d 555, 557 (6th Cir. 2000) ("[T]he party seeking summary judgment is responsible for identifying which portion of the record 'demonstrates the absence of a genuine issue of material fact.'")

Even the decision in *Street v. J.C. Bradford & Company*, 886 F.2d 1472 (6th Cir. 1989), which is much maligned by Petitioner, does not support the Petitioner's contention because summary judgment was not even granted in that case.

And even if there were a conflict or ambiguity in how the *Celotex* standard has been applied in other cases, such ambiguity or conflict is irrelevant to the Petition in this case. As illustrated above, no such conflict is manifested here because the District Court's decision was consistent with the decisions of this Court in *Celotex* and the Eleventh Circuit in *Clark*. Accordingly, the petition for a writ of certiorari should be denied.

II. The District Court, which had jurisdiction based both on a federal question and on diversity, did not err by using the federal standard for summary judgment instead of the Tennessee standard.

The Petitioner's alternative grounds for review are similarly without merit. Petitioner maintains that the District Court should not have used the federal standard for summary judgment but instead should have used the Tennessee standard, which was recently addressed by the Tennessee Supreme Court in *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1 (Tenn. 2008).

This Court has long held that in diversity actions "federal courts are to apply state substantive law and federal procedural law". *Hanna v. Plumer,* 380 U.S. 460, 465 (1965). Where the source of the federal rule is the Federal Rules of Civil Procedure the decisive question is whether the rule governs a matter "which, though falling within the uncertain area between substance and procedure, [is] rationally capable of classification as either," *id.* at 472. If the subject matter of the federal rule is "arguably procedural" *id.* at 476 (Harlan, J., concurring), then the rule does not overstep the Rules Enabling Act and is therefore to be followed. *Id.* at 471.

Further federal rules purporting to govern procedural matters, which are duly passed by Congress, shall be presumed constitutionally valid unless they cannot rationally be characterized as rules of procedure. *Id.* at 471.

Courts have universally found that the rules for summary judgment are procedural and therefore applicable in diversity actions rather than the state summary judgment rules. *See e.g. Stickley v. State Farm Mut. Auto. Ins. Co.*, 505 F.3d 1070, 1076 (10th Cir. 2007) (In diversity cases federal courts are governed by federal law in determining the propriety of the district court's grant of summary judgment.); *Doe v. Doe*, 941 F.2d 280, 287 (5th Cir. 1991) ("Federal courts-irrespective of diversity-are to employ the summary judgment standard of Fed.R.Civ.P. 56."); *McEwen v. Delta Air Lines, Inc.*, 919 F.2d 58, 60 (7th Cir. 1990) ("Federal courts may grant summary judgment under Rule 56 on concluding that no reasonable jury could return a verdict for the party opposing the motion, even if the state would require

the judge to submit an identical case to the jury.") *Lavin v. New York News, Inc.*, 757 F.2d 1416, 1419 (3d Cir. 1985) (In diversity action, the standards for granting summary judgment are matters of federal law); *Lewis Refrigeration Co. v. Sawyer Fruit, Vegetable & Cold Storage Co.*, 709 F.2d 427, 430 n. 3 (6th Cir. 1983) ("[I]n this-and all other Circuits-the Federal Rules of Civil Procedure, Rule 56 standard governs summary judgment in diversity cases."); *Sullivan v. Massachusetts Mut. Life Ins. Co.* 611 F.2d 261, 263 -264 (9th Cir. 1979) ("Although California law controls the substantive issues in this case, the standards for determining whether summary judgment was appropriate call for application of federal law.").

According to the Petitioner the summary judgment standard is a "state substantive law" because it affects a litigant's right to a jury trial. (Pet. 12). Petitioner has misconstrued the test. As this Court recently stated:

> We have long held that this limitation means that the Rule must "really regulat[e] procedure,- the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them," The test is not whether the rule affects a litigant's substantive rights; most procedural rules do. What matters is what the rule itself regulates: If it governs only "the manner and the means" by which the litigants' rights are "enforced," it is valid; if it alters "the rules of decision by which [the] court will adjudicate [those] rights," it is not.

> Applying that test, we have rejected every statutory challenge to a Federal Rule that has come before us.

Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co. 130 S. Ct. 1431, 1442 (2010) (citations omitted).

Rules for summary judgment neither change a plaintiff's remedies or entitlements to relief nor abridge a defendant's rights; they alter only how the claims are processed. The summary judgment process governs only "the manner and the means" by which the litigants' rights are "enforced", and are therefore procedural. *Id.*

Moreover, "there is a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts". *Byrd v. Blue Ridge,* 356 U.S. 525, 538 (1958). Interposing a different state rule concerning summary judgment into the federal judicial process violates this policy.

Further, the Petitioner's claim that summary judgment denies a litigant the right to a jury trial is without support. The Fifth Circuit recently considered and rejected this argument:

> [The] claim that he was denied a jury trial is frivolous. Federal Rule of Civil Procedure 56(c) requires the court to render summary judgment if the appropriate materials on file "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." As this court has explained, "[t]he function of the jury is to try the material facts; where no such facts are in

> dispute, there is no occasion for jury trial. Thus the right to trial by jury does not prevent a court from granting summary judgment." When the district court properly entered summary judgment dismissing Baranowski's claims, his demand for a jury trial became moot.

Baranowski v. Hart, 486 F.3d 112 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 707 (2007) (citations omitted).

As early as 1902 this Court addressed itself to the question of whether the summary judgment procedure was constitutional. It stated:

> If it were true that the rule deprived the plaintiff in error of the *right* of trial by jury, we should pronounce it void without reference to cases. But it does not do so. It prescribes the means of making an issue. The issue made as prescribed, the right of trial by jury accrues. The purpose of the rule is to preserve the court from frivolous defenses, and to defeat attempts to use formal pleading as means to delay the recovery of just demands.
>
> Certainly a salutary purpose, and hardly less essential to justice than the ultimate means of trial.

Fidelity & Deposit Co. of Maryland v. United States, 187 U.S. 315, 320 (1902).

In a further effort to show a substantive state law, Petitioner maintains that the source of the Tennessee standard is not a rule of procedure per se, but rather case law----the *Hannan* decision. Petitioner argues

that the language of the federal and the state rule do not conflict, but the summary judgment standard in Tennessee differs from the federal standard because of the Tennessee Supreme Court's decision in *Hannan*. Because of this, the Petitioner reasons that the Tennessee standard must be substantive state law. (Pet. 9).

The Petitioner's reasoning is incorrect. As a threshold matter, the Tennessee Rule 56 does in fact differ from the Federal Rule 56.[3]

More importantly though, even though *Hannan* is an important case, it nevertheless concerns the *procedure* by which Tennessee courts are to resolve summary judgment motions. The fact that there are cases interpreting and applying rules of procedure does not somehow transform such rules into substantive law. For example, this Court's ruling in *Celotex*, and the cases that have followed, have not changed the fact that summary judgment still governs

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[3] Tennessee Rule of Civil Procedure 56 contains a subsection that has no analogue in the Federal Rules of Civil Procedure:

> 56.03. Specifying Material Facts. - In order to assist the Court in ascertaining whether there are any material facts in dispute, any motion for summary judgment made pursuant to Rule 56 of the Tennessee Rules of Civil Procedure shall be accompanied by a separate concise statement of the material facts as to which the moving party contends there is no genuine issue for trial. Each fact shall be set forth in a separate, numbered paragraph. Each fact shall be supported by a specific citation to the record.

Tenn.R.Civ. P. 56.03.

"the manner and the means by which the litigants' rights are enforced" and is therefore procedural. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.* 130 S. Ct. at 1442.

The Sixth Circuit in *Devonshire v. Johnston Group First Advisors*, considered the this issue. The plaintiff appealed the grant of summary judgment, maintaining that Ohio courts would have reached a different result because Ohio courts as a matter of case law did not resolve the issue of proximate cause on summary judgment. The Sixth Circuit nevertheless applied the federal rule:

> [A]ssuming that Ohio forbids its courts from determining the issue of proximate cause at the summary judgment phase, federal courts must obey Federal Rule of Civil Procedure 56(c), which instructs federal courts to grant summary judgment on substantive legal issues, proximate cause included, when there are no genuinely disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Because Rule 56(c) directly covers the summary judgment issue here, this court may apply different state law only if Rule 56(c) cannot rationally be characterized as procedural. Under this test Rule 56(c) is of course procedural.

166 Fed.Appx. 811, 814 (6th Cir. 2006) (citations omitted).

Accordingly, the District Court did not err in applying the federal standard for summary judgment in this case.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

JOHN J. COOK
Counsel of Record
Pietrangelo Cook PLC
6410 Poplar Avenue
Suite 190
Memphis, Tennessee 38119
(901) 685-2662
jcook@pcplc.com

Counsel for Respondents Preferred Medical Systems, LLC, Jerry Kirk McGuire and Greg Reed

APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A: Statement of Undisputed Material Facts in Support of Defendants' Motion for Summary Judgment, In the United States District Court for the Western District of Tennessee Western Division (July 10, 2007) 1b

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

No. 05-2390 V

[Filed July 10, 2007]

MEDISON AMERICA, INC., a California Corporation	)
Plaintiff,	)
v.	)
PREFERRED MEDICAL SYSTEMS, LLC, a Tennessee Limited Liability Company, JERRY K. MCGUIRE, GREGG REED, BRIAN KEITH, MIKE BUCHKO, and GENERAL ELECTRIC COMPANY, a New York Corporation	)
Defendants,	)

STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

For purposes of summary judgment only, Defendants Preferred Medical Systems, LLC ("Preferred Medical"), Jerry K. McGuire ("McGuire"), and Greg Reed ("Reed") (collectively "Defendants") file this Statement of Undisputed Material Facts in support of their Motion for Summary Judgment pursuant to Rule 56 and in accordance with LR7.2(d), and state as follows:

1. The Plaintiff Medison America, Inc. ("Plaintiff" or "Medison America") is a California corporation. The Plaintiff is owned by Medison Co., Ltd. ("Medison, Ltd."), a Korean company. Medison, Ltd. manufactures ultrasound equipment. [*See* First Amended Complaint, Dkt. No. 2 ("Amended Complaint") ¶¶ 1-3].

2. The Plaintiff Medison America sells ultrasound equipment throughout the United States. The ultrasound equipment sold by the Plaintiff is manufactured by Medison, Ltd., a Korean Company [*See* Amended Complaint, ¶¶ 33-34].

3. General Electric Company ("GE"), a New York corporation, manufactures ultrasound equipment. [*See* Amended Complaint, ¶ 27; Declaration of Jerry Kirkland McGuire ("McGuire Declaration") ¶ 3, attached as SJ Exhibit 2.].

4. Preferred Medical Systems, LLC ("Preferred Medical") is a Tennessee limited liability company. [*See* Amended Complaint, ¶ 24].

5. Preferred Medical is an independent manufacturer's representative for GE in the sale of ultrasound equipment, serving such capacity in the

States of Tennessee, Mississippi, Alabama, Arkansas, Louisiana and Georgia. [*See* McGuire Declaration ¶ 4]

6. There are at least 3,000 potential purchasers of ultrasound equipment in the OB/GYN market within the States of Tennessee, Mississippi, Alabama, Arkansas, Louisiana and Georgia [*See* McGuire Declaration ¶ 5].

7. GE has at least 23 service and support personnel in the States of Tennessee, Mississippi, Alabama Arkansas, Louisiana and Georgia to repair and service ultrasound equipment. [*See* McGuire Declaration ¶ 6, S.J. Exhibit 2]

8. Plaintiff only has two (2) service and support personnel in the United States, both of whom reside in California. Plaintiff's Rule 30(b)(6) designated corporate representative testified as follows:

Q. You told us earlier that Medison has, I think, 16 employees?

A. No, I said 19.

Q. Nineteen. Are any of those employees service technicians?

A. Two of them.

Q. Where do they -- where do they reside?

A. They work out of the head office.

Q. That's in California?

A. Yes.

[*See* Deposition of Medison America, Inc., by and through its corporate designee, Robert DePalma ("Medison Dep."), taken on March 9, 2007, p. 161. Copies of the pertinent portions of the Medison Dep., cited herein, are attached collectively as SJ Exhibit 3].

9. In January 2002, Medison America's parent company Medison, Ltd. entered into a receivership procedure in Korea wherein its primary lender assumed joint control of the company along with Medison, Ltd.'s existing management. Plaintiff alleged this fact as follows:

> In January 2002, in a receivership procedure unique to the law of Korea, Medison Ltd. became co-managed by the chief executive officer of Medison Ltd, with Medison Ltd.'s governing board of directors and Medison Ltd.'s chief lender, Hana Bank, Seoul Korea.

[*See* Amended Complaint, ¶ 5].

10. In a memorandum to the Plaintiff Medison America, the Korean legal counsel for Medison, Ltd. stated that the reorganization proceedings in Korea were similar to chapter 11 proceedings in the Untied States (the "Korean Legal Memo"). The Korean Legal Memo stated in relevant part:

> Medison is currently undergoing corporate reorganization proceedings under the Company Reorganization Act of Korea **(which is similar to Ch. 11 proceedings in the U.S.)**

[*See* Exhibit 11 to Medison Dep., which is attached hereto as part of collective SJ Exhibit 3, (emphasis added)].[1]

11. The reorganization proceedings were conducted under the Company Reorganization Act of Korea, which states the following as its purpose:

> The purpose of this Act is to coordinate the interest of creditors, stockholders and other interested persons, and to strive for the reorganization and recovery of the business, in respect of any joint stock company (hereinafter in this Act referred to as the "company") **which faces imminent bankruptcy due to poor financial circumstances**, but which is likely to recover economically.

[*See* Company Reorganization Act of Korea, Article 1 (emphasis added), a copy of the Company Reorganization Act of Korea is attached as S.J. Exhibit 5.][2]

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[1] The receipt and authenticity of the Korean Legal Memo has been confirmed by the Plaintiff. [See Response of Medison America, Inc. to General Electric Company's First Request for Admission ("Plaintiff's Admissions") No. 38. Copies of the pertinent portions of the Plaintiff's Admissions, cited herein, are attached collectively as S.J. Exhibit 4.]

[2] The Plaintiff has raised the issue of Korean law in its Amended Complaint by alleging that the receivership proceeding of Medison, Ltd. was "unique to the law of Korea" [Amended Complaint ¶ 5] and by contending that using the word "bankruptcy" to describe the Korean reorganization proceeding is false and deceptive. [Amended Complaint ¶¶ 5-9] Accordingly, this court may consider the references to the Company Reorganization

12. Under the Company Reorganization Act of Korea, a company in the reorganization proceedings may be liquidated in certain circumstances. [*See* Company Reorganization Act of Korea, Article 191 (Programs for Liquidation), S.J. Exhibit 5]

13. Plaintiff's own auditors described Medison, Ltd.'s proceedings as a "bankruptcy" in a note to the Plaintiff's 2003/2004 Financial Statements. [*See* Exhibit 13 to Medison Dep., Note 4 "Related Party Transactions", p. 12, which is attached as part of S.J. Exhibit 3 hereto]

14. The United States Bankruptcy Court for the Southern District of New York described the proceedings under the Company Reorganization Act of Korea as follows:

> The record confirms that Korean bankruptcy law, and in particular the Company

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Act of Korea above and other relevant materials pursuant to Fed.R.Civ.P. 44.1, which provides as follows:

> A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

Fed.R.Civ.P. 44.1. The Advisory Committee Notes to Rule 44.1 provide that "[i]f notice is given by one party it need not be repeated by any other and serves as a basis for presentation of material on the foreign law by all parties."

> Reorganization Act, is substantially similar to United States law.

In re Petition of Kyu-Byung Hwang, 309 B.R. 842, 846 (Bankr.S.D.N.Y. 2004) (affording comity to Korean reorganization proceeding).[3]

15. According its own financials statements, the Plaintiff Medison America had a multi-million dollar deficit in the year 2003, with liabilities exceeding its assets by $25,845,091, and a multi-million dollar deficit in the year 2004, with liabilities exceeding its assets by $24,671,941. [*See* Exhibit 13 to Medison Dep., pp. 4-5 which is attached as part of SJ Exhibit 3 hereto]

16. Plaintiff, through its Rule 30(b)(6) corporate representative Robert DePalma, confirmed the accuracy of the Plaintiff's financial statements. DePalma testified:

> Q. And whose job was it to go over these financial statements?
>
> A. [DePalma] This would be Victoria Murphy, and these were all audited by the same audit team that we used up until last year.
>
> Q. Who is that audit team?

---

[3] This Honorable Court may take judicial notice of this opinion. *Rodic v. Thistledown Racing Club, Inc.*, 615 F.2d 736, 738 (6th Cir. 1980) ("Federal courts may take judicial notice of proceedings in other courts of record.").

A. I'd have to check. Its name escapes me.

Q. But someone would review these to ensure that these obviously were accurate --

A. Absolutely.

Q. -- financial statements?

A. Yes.

Q. And so, all of the statements made in there would be accurate and -- as far as you would know as a representative of the company?

A. Yes.

[*See* Medison Dep., pp. 158-59].

17. Plaintiff's Complaint alleges that Defendants made certain disparaging statements to potential purchasers, and Plaintiff's Rule 26 Disclosures lists prospective customers that it contends did not purchase its product because of the alleged disparaging statements. [*See* Amended Complaint, ¶¶ 129-148; and, Plaintiff's Rule 26 Disclosures, Exhibit A, a copy of the cited portions of which is attached hereto as SJ Exhibit 6]. These two documents, as cited and collectively, identify the universe of customers to whom Plaintiff alleges Defendants made disparaging statements about Plaintiff and/or its products (hereinafter, the identity of the prospective customers shall be referred to as the "Prospective Customers").

18. None of the Prospective Customers owned Medison ultrasound equipment prior to the time of the alleged statements. [*See* Plaintiff's Admissions No. 30, S.J. Exhibit 4]

19. Defendants Preferred Medical, McGuire and Reed did not make any false or misleading statements of fact concerning the Plaintiff or Plaintiff's products or services to the Prospective Customers. [*See* McGuire Declaration ¶¶ 7-8, SJ Exhibit 2; and, Declaration of Greg Reed ("Reed Declaration") ¶¶ 7-8. A copy of the Reed Declaration is attached hereto as SJ Exhibit 7.]

20. In its Response to Interrogatories, the Plaintiff stated that the information upon which it based the Amended Complaint came "exclusively from" Mark Patterson, Mary Margaret Little and Cheryl Martin. [*See* Plaintiff's Answer To Defendant General Electric Company's First Interrogatories To Plaintiff, Answer No. 1, attached hereto as S.J. Exhibit 8]. Plaintiff added one more individual to this list, Martin Harris, during its deposition. [*See* Deposition of Medison America, Inc., by and through its corporate designee, Robert DePalma ("Medison Dep."), taken on March 9, 2007, pp. 101-107, attached as S.J. Exhibit 3]

21. Plaintiff's witness Mark Patterson has an agreement with Bio-Core, Inc. to assist them in the sale of Medison ultrasound equipment. [*See* Deposition of Mark Patterson, taken on March 23, 2007 and on May 21, 2007 ("Patterson Dep."), p. 17, Copies of the portions of Patterson Dep. cited herein are attached collectively as SJ Exhibit 9.]. Patterson's company and Bio-Core, Inc. are the exclusive distributors of Medison ultrasound equipment in the States at issue in the Amended Complaint. [*See* Patterson Dep., pp. 36-37].

Mr. Patterson testified during his deposition about allegedly disparaging statements made to the Prospective Customers. Mr. Patterson admitted that he was not present at the time that the statements were made and that all of his information as to whether Defendants made these statements is based upon the out of court statements of third parties. He testified:

> Q: Okay. And let me just make sure I understand the basis for your knowledge on all of these.
>
> A: [Patterson]: Sure.
>
> Q: As to the doctors identified on Exhibit 3, you were not present when the alleged statement was made by the GE representative, correct, or the Preferred Sales person?
>
> A: That's correct. I was not present during that —
>
> Q: You were not present to actually hear the statement from the sales representative, correct?
>
> A: Correct.
>
> Q: And so you are getting the information second-hand from a doctor or another employee in the office; is that right?
>
> A: That's correct.

[*See* Patterson Dep., p. 144, S.J. Exhibit 9; *see also* Patterson Dep., p. 302, S.J. Exhibit 9]

22. Patterson also testified that he did not have any documents containing the allegedly disparaging statements given by the Defendants to any Prospective Customer.

> Q. You don't have any documents that were given to doctors by Preferred Medical or GE that contain these alleged disparaging statements, right?
>
> A. [Patterson] Right.

[*See* Patterson Dep., p. 304].

23. Plaintiff's witness Martin Harris is the sole shareholder and an employee of Biocore, Inc. [*See* Deposition of Martin Harris, taken on May 25, 2007 ("Harris Dep."), p. 25, Copies of the portions of Harris Dep. cited herein are attached collectively as SJ Exhibit 10.] Harris also testified during his deposition about allegedly disparaging statements made to some of the Prospective Customers. However, like Patterson, Harris admitted that he was not present at the time that the alleged statements were made and that he did not hear the Defendants make the alleged statements.

> Q. First I want to focus on whether you, Martin Harris, have ever heard a Preferred Medical representative make a disparaging statement about Medison; have you actually been present and heard such a statement?
>
> A. [Harris] No.

Q. Have you ever heard Preferred Medical make a disparaging statement about Bio-Core?

A. No.

Q. Thank you. Same context, have you personally heard a Preferred Medical representative make a disparaging statement about Medison's products?

A. No.

Q. Or Bio-Core's products?

A. No.

Q. Have you ever seen any documents that you have any reason to believe were created by Preferred Medical that made disparaging statements about Medison?

A. No.

Q. About Medison's products?

A. No.

Q. About Bio-Core?

A. No.

[*See* Harris Dep., pp. 123-124, S.J. Exhibit 10]

24. Plaintiff's witness Mary Margaret Little is the sister of Defendant Kirk McGuire and is a former

employee of Preferred Medical. Ms. Little's employment with Preferred Medical terminated on or about July 27, 2004. [*See* Deposition of Mary Margaret Little taken on March 19, 2007 ("Little Dep.") pp. 20, 23. A copy of the portions of the Little Dep. cited herein are attached collectively as SJ Exhibit 11.]

25. Ms. Little testified that while working for Preferred Medical she had made allegedly disparaging statements about Medison, but during her deposition she could not identify any specific customer to whom such statements were made:

> Q. Can you identify one of those customers for me?
>
> A. [Little] There was one in -- up around Fayetteville, Arkansas.
>
> Q. Do you remember the name?
>
> A. I believe I've given it to Mr. Parrish, but I don't recall it off the top of my head.
>
> Q. Any other customers that you remember telling that story to, and by that story, I mean what you've described you would say about Medison?
>
> A. Yeah. Every customer that was a potential 3D, 4D customer that brought that up was told that story.
>
> Q. Well, let's talk about what you told customers first. Okay.

A. By me, that's what I'm saying, by me.

Q. And I understand -- I understand your answer. But what I'm asking you is slightly different. And I'm asking you if you remember the identity of any specific customers who you told that story to?

A. If you can get the list of the sales that I made when I was in new equipment, then I can identify them.

Q. So sitting here today, you don't know the answer?

A. I don't remember the names.

[*See* Little Dep., p. 109, SJ Exhibit 11].

26. Ms. Little similarly failed to identify the customers who allegedly heard statements made by Preferred Medical employee Scott Martin, or even what Mr. Martin may have said to them. She testified:

Q. How many specific times can you remember?

A. [Little] I would say probably three, but I wasn't there long when -- after he got there.

Q. And each time he said it, did he say the entire litany that you have given, or did he say part of it? What did he say each time?

A. I don't know.

Q. What customer was he [Scott Martin] talking to?

A. I don't know. A customer who was interested in Medison.

[*See* Little Dep., p. 105, SJ Exhibit 11].

27. Ms. Little similarly failed to identify the customers who allegedly heard statements made by Preferred Medical employee Kim Wilson:

Q. What customer was she [Kim Wilson] speaking to?

A. I have no idea.

[*See* Little Dep., pp. 103-104, SJ Exhibit 11].

28. During her deposition, Ms. Little identified only one specific customer to whom Defendant Kirk McGuire allegedly made a statement. However, Ms. Little testified that she did not actually hear the statement.

Q. Tell me what customer he [Kirk McGuire] told that Medison was in bankruptcy?

A. I don't know their names.

Q. Do you know any customer he made any of the statements you've just listed to?

A. I believe a Dr. Sigman out of Alabama.

Q. Were you present when Mr. McGuire spoke with Dr. Sigman?

A. No. But I heard him going down the hall, talking about he had told him the Medison story.

Q. **Okay. Did you hear Mr. McGuire make any statements to Dr. Sigman?**

A. No.

Q. Were you there when he did the demo?

A. No.

Q. Were you there when he made phone calls to Dr. Sigman?

A. I may have been present for some of those.

Q. Well, were you?

A. I don't know. There were lots of times that I sat in on -- when he was on calls. And I don't remember now what doctor he was speaking with.

Q. And that's all I'm asking, okay. I'm just asking you what you do know and what you don't know.

A. Okay.

Q. Okay. Now, what statement -- what statement did you hear him make about his conversation with Dr. Sigman?

A. That he had told him the Medison story. He was going to take a different look -- take another look.

Q. Anything else that you heard him say about his conversation with Dr. Sigman?

A. That Dr. Sigman had some financial problems. He didn't know that he was going to be able to get leased anyway, something to that effect about his credit not being good. Something like that.

Q. Anything else?

A. Not that I remember.

[*See* Little Dep., pp. 113-115 (emphasis added), SJ Exhibit 11].

29. In her affidavit dated January 16, 2006, Ms. Little mentioned another customer "Dr. Scott Smith", but again Ms. Little did not hear what McGuire was alleged to have said to this customer. Ms. Little claims that she was with the customer but McGuire was not and had allegedly made the statements to the customer through her cell phone.

He got the customer – **had me give my cell phone to the customer** so he would make sure that the customer heard the story. I'm

> pretty sure that office went with us instead of Medison because they were afraid.

[*See* Affidavit of Mary Margaret Little, executed on January 16, 2006, ("Little Aff.") p.28. (emphasis added)]. A copy of the entire affidavit was filed by Plaintiff on or about August 25, 2006, Dkt. No. 30. Portions of the Little Aff. cited herein are attached as SJ Exhibit 12]

30. Additionally, "Dr. Scott Smith" is not listed among the doctors included in Plaintiff's list of Prospective Customers. [*See* Amended Complaint, ¶¶ 129-148 (Dkt No. 2) and Plaintiff's Rule 26 Disclosures, Exhibit A, SJ Exhibit 6].

31. The only other specific customer mentioned by Ms. Little in her Affidavit is an OB practice in New Albany. However, Ms. Little testified that the customer's decision to purchase a GE product rather than a Medison was based upon negative information he had received from a Medison customer, not from the Defendants:

> Well, I ran across a doctor in New Albany in the summer (of 2005) who told me that he was interested in Medison equipment, but he was going to go with GE **because he had spoken with a customer of Medison, and the service was horrible.**

[Little Aff. p. 27 (emphasis added), S.J. Exhibit 12]

32. Ms. Little also did not speak to any potential purchaser about their reactions to the alleged statements. She testified:

Q. Can you identify any doctors who you have spoken to about how the Medison story influenced their decision to buy or not to buy from Medison, any doctors who you have actually spoken to about their reaction to anything said about Medison?

A. That I've spoken to about their reaction?

Q. Yes, ma'am.

A. I haven't spoken to any doctors about their reaction.

Q. Anybody who was making the purchasing decision at a doctor's office?

A. It may be the lady in Louisiana that told the story about the screwdriver. But, I mean, she wasn't going to buy Medison anyway.

Q. Well, she told the Medison story, right?

A. Right. But, I mean, it was -- her reaction was that, you know, they weren't going to even consider them because it was so bad -- the service was so bad.

Q. Anybody else?

A. I didn't talk to people about their reactions to the Medison story.

[*See* Little Dep., p. 115 (emphasis added), SJ Exhibit 11].

33. Finally, Ms. Little's never heard Defendant Greg Reed make disparaging statements about the Plaintiff. She testified:

> Q: Have you ever heard Gregg Reed make any disparaging statement about Medison?
>
> A. No.
>
> Q. Did you tell Mr. DePalma that?
>
> A. I don't think that he and I discussed anything specific. It was general, what we talked about was general.

[*See* Little Dep., p. 110, SJ Exhibit 11]

34. Plaintiff's witness Cheryl Martin is a former applications technician who worked for GE and Preferred Medical on a contract basis from time to time. [*See* Affidavit of Cheryl Martin, executed on January 31, 2006, ("Martin Aff.") pp. 14, 15, 37, 38. A copy of the entire affidavit was filed by Plaintiff on or about August 25, 2006, Dkt. No. 31. Portions of the Martin Aff. cited herein are attached collectively as S.J. Exhibit 13]

35. Ms. Martin only testified about one specific incident involving Medison and a potential purchaser. The incident involved a doctor in Alabama and allegedly occurred in the Fall of 2003. At the time, Martin was not working for Preferred Medical and was only in the doctor's office for purely personal reasons. Ms. Martin had accompanied her daughter who was pregnant at the time to her daughter's doctor's office

for an ultrasound. Her testimony about the incident is as follows:

> CLM: My daughter called me last week and told me that her doctor---I don't know his first name, but the office is Brown McCool in Fairhope, Alabama just purchased a Voluson. The doctor had Medison before. I thought when she was pregnant the first time, in 2003, I went there, in the fall of that year, and I went with her for her ultrasound. The girl started the scan, and I thought: how did she get a Medison? They had just gotten it. I feel horrible telling you this, but I said: "Did you know that they were in bankruptcy?" She said, "No!" And what I heard from my daughter last week that they pulled that Medison and that GE now has a Voluson in there. My daughter will be the first patient that the doctors use the Voluson on this week or next.

[*See* Martin Aff., p. 52, SJ Exhibit 13].

36. The Plaintiff's corporate representative admitted that Plaintiff has received complaints from its customers. The corporate representative stated:

> Q. When was the last time you talked to Mr. Ghilduyal about the frequency of complaints that he gets from customers?
>
> A. We have one situation in Missouri that's going on right now, but it's the only one that I know in quite some time.

[Medison Dep., p. 174, S.J. Exhibit 3]

37. At least one of these complaints, as Plaintiff admits in the Amended Complaint, ripened into a lawsuit against Plaintiff in Alabama. In May 2003, the Plaintiff was sued in a case styled *George V. Seir, DVM, et al. v. Medison America, Inc.*, No. 02-087-B (Circuit Court Autauga County, Alabama). The suit alleged among other things that Medison America "negligently repaired the equipment or negligently failed to repair the equipment on numerous occasions." As of the commencement of the present action, this lawsuit in Alabama was pending and unresolved. [*See* Amended Complaint ¶¶ 65-71.]

38. Plaintiff has admitted that Defendants have not exercised dominion and control over any property of the Plaintiff. [Medison Dep. pp. 252-253, S.J. Exhibit 3]

39. Plaintiff has admitted that Defendants have not interfered with any contracts Plaintiff may have with third parties. [Medison Dep. pp. 253-254, S.J. Exhibit 3]

Respectfully submitted,

/s/ Jonathan P. Lakey
JONATHAN P. LAKEY (16788)
ANTHONY PIETRANGELO (15596)
PIETRANGELO COOK PLC
6410 Poplar Ave, Suite 190
Memphis, TN 38119
(901) 685-2662
jlakey@pietrangelocook.com

Counsel for Defendant Preferred Medical Systems, LLC and Jerry Kirk McGuire.

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[*Certificate of Service omitted in printing of this appendix*]